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The populist challenge to the European Court of Human Rights

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This article analyzes the European Court of Human Rights (ECtHR) from the perspective of the recent extraordinary wave of populism in Europe. It argues that populism poses a serious and distinctive challenge to the ECtHR since supranational judicial review is at odds with the populist ideology. What makes the populist challenge distinctive is the combination of the ideological basis of populism, its wide appeal and capacity to reach ordinary people, and populists' tendency to remove limitations on their power. With respect to the last point, the article introduces a categorization of anti-court techniques and takes stock of the ECtHR's institutional setting. It concludes that although the situation is not perfect—the budget and judicial selection are especially problematic—the ECtHR is rather well insulated from eventual attacks targeting its structural features or the judicial personnel. However, including the ECtHR in the "narrative of blame," populism is very strong in another anti-court strategy—achieving gradual erosion of a court through delegitimization. That is particularly threatening for the ECtHR due to its vulnerability to legitimacy challenges manifested in the past decade. As a result, the populist challenge will likely require careful management of the ECtHR's social legitimacy.

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1. Introduction

The European Convention on Human Rights (ECHR or the Convention) and the European Court of Human Rights (ECtHR or the Strasbourg Court) have been characterized as "the most effective human rights regime in the world"[1] or as "the crown jewel of the world's most advanced international system for protecting civil and political liberties."[2] However, for some time, the Strasbourg Court has been "under substantial pressure"[3] resulting from criticism and resistance against the ECtHR. Contemporary social and political developments in Europe do not suggest that the pressure is going to ease anytime soon. In particular, the "populist explosion"[4] has resulted in even greater pressure being imposed on the Strasbourg Court, as the extraordinary rise of populism arguably amounts to the largest political transformation of Europe since the end of the Cold War.[5] Indeed, populist leaders have portrayed the ECtHR as "a threat to the security of the EU people,"[6] a useless "European circus,"[7] and a "ravening monster."[8] Despite that, the populist challenge to the ECtHR has not yet been sufficiently explored. The aim of this article is to explain how and why the rise of populism challenges and may eventually threaten the ECtHR's independence, authority, and legitimacy.

The article argues that the populist challenge to the Strasbourg Court is distinctive due to the combination of the ideological basis of populism, populists' style of political communication, and its resonance within the general public. These features imply that the recent surge of populism presents a particularly pressing challenge for the ECtHR. Given the ideological mismatch between populism and the ECtHR's performance and the tendency of populist leaders to remove limitations on their power, the article examines how the Strasbourg Court is situated to withstand eventual populist attacks. It concludes that the ECtHR is quite well insulated from two major anti-court strategies—limiting a court's ability to interfere with the given agenda (e.g. by jurisdiction stripping, paralyzing the court), and "taming" the court by targeting its judicial

[1] Alec Stone Sweet & Hellen Keller, *Introduction: The Reception of the ECHR in National Legal Orders*, in A Europe of Rights: The Impact of the ECHR on National Legal Systems 11 (Hellen Keller & Alec Stone Sweet eds., 2012).

[2] Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 Eur. J. Int'l L. 125, 125 (2008).

[3] Criticism of the European Court of Human Rights 3 (Patricia Popelier, Sarah Lambrecht, & Koen Lemmens eds., 2016).

[4] John Judis, The Populist Explosion (2016).

[5] Martin Eiermann, Yascha Mounk, & Limor Gultchin, *European Populism: Trends, Threats and Future Prospects*, Institute for Global Change (Dec 29, 2017), *available at* https://institute.global/insight/renewing-centre/european-populism-trends-threats-and-future-prospects.

[6] Orban attacks the European Court of Human Rights, EURACTIV.com (2017), *available at* https://www.euractiv.com/section/global-europe/news/orban-attacks-the-european-court-of-human-rights-at-epp-congress/.

[7] Italy violated human rights of mafia boss, The Local (Oct 25, 2018), *available at* https://www.thelocal.it/20181025/italy-violated-human-rights-of-mafia-boss-eu-court.

[8] Thierry Baudet, *The Anti-democratic Impulses of the ECHR*, Spiked (Jan 19, 2011), *available at* https://www.spiked-online.com/2011/01/19/the-anti-democratic-impulses-of-the-echr/.

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personnel. Although the ECtHR's situation is not perfect—the budgetary and judicial selection issues are especially serious—the ECtHR is rather well-equipped to prevent or withstand eventual attacks on its structural features and judicial personnel, thanks to the decentralization of the system, a rather high level of judicial self-governance, and institutional safeguards of judicial independence.

However, the populist era makes another, less straightforward strategy particularly threatening—sidelining the court through a gradual erosion of its authority and social legitimacy on the domestic level. The combination of populist ideology and political style can be very powerful in achieving such gradual erosion. Populism provides an ideology resulting in a constitutional vision criticizing current liberal-democratic structures and addressing how "real" democracy should work. Populists then tend to include international human rights courts in the "narrative of blame," which explains who is responsible for the current problems of the people and how to resolve them. This narrative increasingly resonates in the general public since it addresses the people's increasing fear of losing socioeconomic and identity status due to the lack of political control over these matters. By including the Strasbourg Court in the narrative of blame and channeling the people's resentment against the ECtHR, populists possess a significant capacity to mobilize the people—possibly even across countries—and shift the discursive frame surrounding the ECtHR, which can distort the social and political origins of the ECtHR's independence and authority. Such a scenario is particularly dangerous for the Strasbourg Court since the populist main strength matches the ECtHR's weakness in vulnerability to delegitimization manifested in the past decade. In other words, the most challenging implication of the populist wave for the Strasbourg Court is the changing sociopolitical perception of human rights adjudication in Europe.

The novel contribution of this article is threefold. First, by analyzing both the ideational basis of populism and the actual populist challenges to the ECtHR, the article explains the ideological mismatch between populism and international human rights adjudication and shows its manifestations in Europe. Second, the article introduces a novel categorization of techniques used to limit judicial power and discipline courts, and examines the ECtHR's resilience through the prism of this categorization. As a result, it presents populism not merely as a vague threat to the rule of law actors, but points out its real dangers in the setting of a particular institution—the ECtHR. Finally, the analysis shows that formal mechanisms of judicial independence guarding the structural features of a court and its judicial personnel might not be sufficient when facing the populist challenges. Elaborating on the scenario of a gradual erosion of the Strasbourg Court's authority by delegitimization, the article explains that managing the ECtHR's social legitimacy is of crucial importance in the populist age.

The rest of the article proceeds as follows. Section 2 reconstructs populism as an ideology and a constitutional project in order to understand the populist irritation with independent (international) judicial review. Since populists in power tend to consolidate their positions and eliminate limitations on their rule, Section 3 uses a new categorization of anti-court techniques, examines the Strasbourg Court's institutional setting, and assesses the risks and resources in the ECtHR's design vis-à-vis the populist challenge. Section 4 concludes.

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2. Populism as an ideology and constitutional project: A threat to international human rights courts?

In the political discourse, populism is regularly used as a label to humiliate political opponents and blame them for demagogy or opportunism.[9] Populism, however, amounts to something more. Scholars have described populism as a particular political style, political movement, strategy, or discourse.[10] In this vein, populism has been associated with strong political mobilization of the masses by a charismatic leader,[11] with radicalization of the emotional element in politics,[12] and with seeking an exercise of power based on "direct, unmediated, uninstitutionalized support from large numbers of mostly unorganized followers."[13]

Besides that, populism has been studied as a distinct political ideology. It is a thin ideology that does not offer a complete map of the world in the same way as liberalism or socialism. Populism rather provides a set of ideas "about how democracy can and should work, and how leaders can and should relate to the people."[14] Mudde put forth the following influential definition of populism:

> [A]n ideology that considers society to be ultimately separated into two homogeneous and antagonistic groups, "the pure people" versus "the corrupt elite", and which argues that politics should be an expression of the volonté générale (general will) of the people.[15]

Similarly, other authors point out populism's emphasis on the exaltation of popular sovereignty, majority rule, homogeneity of the people, and antagonism towards the elite.[16] Beyond these common features, however, populism takes on many forms. In a chameleon-like way, it is combined with different political ideas leading to varieties of populism.[17] When referring to populism throughout this article, I have in mind the version which currently dominates in European politics and, therefore, is the most pressing for the ECtHR—populism tied with significant exclusionary, ethno-national, and anti-pluralist elements.[18] The anti-pluralism results in claims for the exclusive representation of the people and the popular will: "[P]opulists claim that they, *and only*

[9] Cas Mudde, *The Populist Zeitgeist*, 39 Gov't and Opposition 542, 542–43 (2004).

[10] *See* Takis Pappas, *Modern Populism: Research Advances, Conceptual and Methodological Pitfalls, and the Minimal Definition*, in Oxford Research Encyclopedia of Politics (2016).

[11] Michael Kazin, The Populist Persuasion 1 (1998).

[12] Carlos de la Torre, Populist Seduction in Latin America 4 (2010).

[13] Kurt Weyland, *Clarifying a Contested Concept: Populism in the Study of Latin American Politics*, 34 Comp. Pol. 1, 14 (2001).

[14] Aziz Z. Huq, *The People Against the Constitution*, 116 Michigan L.Rev. 1123, 1132 (2018).

[15] Mudde, *supra* note 9, at 543.

[16] E.g. Margaret Canovan, *Taking Politics to the People: Populism as the Ideology of Democracy*, in Democracies and the Populist Challenge 25 (Yves Mény & Yves Surel eds., 2002); Nadia Urbinati, *The Populist Phenomenon*, 51 Raisons politiques 137 (2013).

[17] Paul Taggart, Populism 2–4 (2000).

[18] Cas Mudde and Cristóbal Rovira Kaltwasser, *Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America*, 48 Gov't and Opposition 147, 155 (2013); Bojan Bugaric, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 Ger. Law J. 390 (2019).

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they, represent the people."[19] Such anti-pluralism has significant illiberal implications, as the following sections show.[20] Thus, I mostly address what other scholars label as authoritarian populism.[21]

2.1. The building blocks of the populist ideology

As an ideology, populism is based on a specific understanding of fundamental concepts of constitutional and political theory. The combination of specific visions of the people, popular will, and the concept of the political and constitutional identity leads populists to a constitutional project, which is impatient with checks on the popular will. In order to understand the populist challenge to the ECtHR and build my argument, it is first necessary to examine the populist vision of these concepts.

The populist view of the people is anti-elitist, anti-pluralistic, and anti-individualistic. The starting point of populism is a bipolar account of society—us versus them. The society is seen to be divided into two groups: the (common, ordinary, or real) people and the elite. Accordingly, not all the members of society form the people in the populist sense.[22] The elite are defined broadly as the establishment—political, economic, cultural, and media elites deforming the will of the real people.[23] Mudde and Rovira Kaltwasser explain that the populist notion of the people is both unifying and divisive. It aims to unify the majority and mobilize it against a common enemy—the elite.[24] The populist notion of the (common) people is vague, even fictional.[25] Invoking the concept of (common) people often refers to an undefined group excluded from power—the people feeling oppressed by the elites. Such a blurred conception allows populists to unite different social groups and generate their shared identity.[26] Moreover, the bifurcation of society is further reinforced by the moralistic appeal. The common people are seen as morally pure, whereas the elite are corrupt.[27]

The homogenous view of the common people forms the basis for the populist conceptualization of the popular will. It is essentially monist—there is one united people, with one set of interests and one will.[28] The one will of the people is also well cognizable for the populist leaders since it stems from the shared consciousness of

[19] Jan-Werner Müller, What is Populism 20 (2016).

[20] *See also* Gábor Halmai, *Populism, Authoritarianism and Constitutionalism*, 20 Ger. Law J. 296 (2019); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. Chicago L.Rev. 545 (2018).

[21] E.g. Pippa Norris & Roger Inglehart, Cultural Backlash: Trump, Brexit and the Rise of Authoritarian Populism (2018); Bojan Bugaric & Alenka Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?* 10 Hague J. Rule of Law 21, 22 (2018).

[22] Müller, *supra* note 19, at 21.

[23] Cas Mudde & Cristóbal Rovira Kaltwasser, Populism: a very short introduction 12 (2017).

[24] *Id.* at 11; *see also* Canovan, *supra* note 16, at 34.

[25] Müller, *supra* note 19, at 20.

[26] Mudde & Rovira Kaltwasser, *supra* note 23, at 9–10.

[27] Müller, *supra* note 19, at 24.

[28] Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 Eur. Const. Law Rev. 6, 11 (2016).

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the people—the common sense. In other words, politics is about the issues of the common people being resolved according to the common sense.[29] Hence, the content of the popular will is not necessarily recognized through formalized processes of constitutional democracy, but rather intuitively deduced from the common sense shared by the real people.[30] Such popular will is then perceived as normatively and morally supreme.[31]

As a matter of practical politics, the popular will should be cognized and implemented in an *authentic* way.[32] According to populism, the main task of politics is to make the opinion expressed by the popular will identical to the authority expressed by the state.[33] The populist understanding of popular will is thus characterized by monism, self-evidence, moral correctness, and a demand for its authentic enforcement. Authenticity of the popular will's materialization brings us to the next element of populist ideological vision—the concept of the political.

Populists criticize liberal democratic structures and constitutional procedures for deforming the popular will and depriving it of authenticity. The institutions and procedures of constitutional democracy have allegedly led to politics being replaced with mere administration.[34] In combination with the restrictions of policy choices coming from the international realm and from the liberal language of political correctness, liberal constitutionalist structures turned the polities into "democracies without choices."[35]

Populism aims to bring the authenticity of the popular will back to politics and to repoliticize the public sphere.[36] It builds on the Schmittian concept of the political and polarizes political conflict.[37] The core of politics is driven by antagonism between the people and the elite; without it, there is no politics, just administration.[38] Accordingly, the populist constitutional project refuses "the endless litigiousness" of liberal constitutionalism[39] and the democratic limitations in-built in the design of a constitutional democracy.[40] The same argument applies to limitations stemming from the international level.[41] Overall, populism proclaims the primacy of politics over law.[42] Furthermore, populism tends to ignore the distinction between ordinary

[29] Mudde, *supra* note 9, at 547 and 560.
[30] Müller, *supra* note 19, at 26; Canovan, *supra* note 16, at 32.
[31] Ben Stanley, *The Thin Ideology of Populism*, 13 J. Pol. Ideologies 95, 101 (2008).
[32] *Id.* at 104–05.
[33] Urbinati, *supra* note 16, at 140.
[34] Mudde, *supra* note 9, at 555.
[35] Ivan Krastev, *The Strange Death of the Liberal Consensus*, 18 J. Democracy 57, 60–61 (2007).
[36] Mudde, *supra* note 9, at 555.
[37] *See* Carl Schmitt, The Concept of the Political (1996).
[38] Stanley, *supra* note 31, at 97.
[39] Urbinati, *supra* note 16, at 147.
[40] Margaret Canovan, *Trust the People! Populism and the Two Faces of Democracy*, 47 Pol. Stud. 2 (1999); Mudde, *supra* note 9, at 561.
[41] Paul Blokker, *Populist Constitutionalism*, Verfassungsblog (May 4, 2017), *available at* http://verfassungsblog.de/populist-constitutionalism/.
[42] Halmai, *supra* note 20, at 306.

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and constitutional politics[43] which leads to primacy of the popular will even over the constitution.[44] The Schmittian ideas are invoked again—the constituent power of the people is always present and can be exercised by the people: "In a democracy the people is the sovereign; it can break through the entire system of constitutional norms."[45]

Another element of populist thinking is constitutional identity. According to Jacobsohn, constitutional identity "represents a mix of political aspirations and commitments that are expressive of a nation's past, as well as the determination of those within the society who seek in some ways to transcend that past."[46] Constitutional identity then serves as the basis for the construction of social and legal relationships in a given polity.[47] Similarly, Rosenfeld argues that constitutional identity is a reflection of an imagined community that needs to construe a "distinct self-image."[48] Constitutional identity serves as a "frame of reference and a narrative allowing it to perceive itself as a constituted imagined community."[49] Construing a specific narrative amounting to constitutional identity is crucial for populism. Unity of the common people implies a united constitutional identity.[50] Such a constitutional identity often takes a form of a (mythical) historical narrative about the greatness of the people.[51] In reaction to identity concerns triggered by the rise of cosmopolitanism, populist constitutional identity often manifests as a "localist counter-movement … that profess[es] to represent a given polity's, region's or a community's 'genuine' identity."[52]

In the populist key, the historical and/or identitarian dimension of constitutional identity is often complemented with what I call "the narrative of blame." Populism frequently rises from discontent with the current situation and thrives due to people's frustration, anxiety, and fear of the future. Accordingly, there is a demand for the political forces opposing the current system.[53] The supply side of populism—populist leaders—provides narratives that explain the causes and the meanings of the anxiety: "[H]ere is what is happening, this is why, and these are the people doing it to you."[54] Hence, the populist constitutional identity narrative is often antagonistic and seeks to identify and blame those guilty of causing the anxiety of the common people.[55]

[43] Paul Blokker, *The Populist Threat to Democratic Constitutionalism*, EUI Blog (Nov 14, 2017) https://blogs.eui.eu/constitutionalism-politics-working-group/populist-constitutionalism-4-populist-threat-democratic-constitutionalism/.

[44] Oran Doyle, *Populist Constitutionalism and Constituent Power*, 20 Ger. Law J. 161, 162 (2019).

[45] Carl Schmitt, Verfassungslehre 275 (1928). *See also* Heiner Bielefeldt, *Carl Schmitt's Critique of Liberalism*, *in* Law as Politics: Carl Schmitt's Critique of Liberalism 23, 28 (David Dyzenhaus ed., 2014).

[46] Gary Jacobsohn, Constitutional Identity 7 (2010).

[47] *Id.* at 8.

[48] Michel Rosenfeld, *Constitutional Identity*, *in* The Oxford Handbook of Comparative Constitutional Law 756, 759 (Michel Rosenfeld & András Sajó eds., 2012).

[49] *Id.* at 759.

[50] Corrias, *supra* note 28, at 13.

[51] *Id.* at 13; Urbinati, *supra* note 16, at 139.

[52] Ran Hirschl, *Opting Out of "Global Constitutionalism"*, 12 Law & Ethics of Human Rights 1, 35 (2018).

[53] Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. Int'l Bus. Pol'y 12, 24 (2018).

[54] *Id.*

[55] *See, e.g.*, Krastev, *supra* note 35.

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2.2. Populist constitutional project: Against courts, technocrats, and the supranational?

The combination of the populist understanding of the four elements of populist ideology explains populist unease with the idea of limiting power through checks and balances stemming from constitutional and international structures. The populist ideology is too impatient with checks on the popular will as cognized by populist leaders.

Liberal constitutionalism values checks and balances for limiting the government and preventing tyranny, increasing the expertise of governance, and ensuring legitimacy for government policies.[56] Checks and balances also protect the people from their own possibly erroneous momentary passions by making the system of decision-making decentralized and time-consuming. Populism either does not see these values as desirable or does not believe that checks and balances deliver them. According to populism, checks and balances actors compromise the authenticity of the popular will. Moreover, they are unnecessary and ineffective because the solution of the ordinary people's problems is simple and self-evident.[57] Thus, within the ideational view, the (authoritarian) populist constitutional project is against the constraints imposed upon the will of the common people and tends to reject pluralism, minority rights, and institutions designed to protect them.[58] These legal structures and institutions are often included in the narrative of blame as sources of the people's frustration. For the same reasons, populism is usually against technocratic and non-majoritarian institutions, which can be easily portrayed as "institutionalised elitism and a threat to democracy."[59]

The rise of judicial power comes to the forefront in this regard. The global spread of judicial review of legislation turned constitutional or supreme courts into one of the central actors of democratic lawmaking.[60] Certain issues were taken out of majority control and placed under the protection of judges. Also, the ordinary courts, which lack the power of constitutional review, regularly influence public policies as a result of a judicial review of administrative acts and a review of the consistency of statutes with international human rights treaties or EU law.[61] Since courts and judges are generally more powerful and have a greater say in the system of democratic governance, many populist leaders tried to control the courts once they got into power.

Besides judicializing politics through domestic courts, the recent past has brought about another trend—the proliferation of international adjudication.[62] International

[56] Jenny Martinez, *Horizontal Structuring, in* The Oxford Handbook of Comparative Constitutional Law 547, 548 (Michel Rosenfeld & András Sajó eds., 2012).

[57] Canovan, *supra* note 40, at 6.

[58] Mudde & Rovíra Kaltwasser, *supra* note 23, at 81.

[59] Frank Vibert, The Rise of the Unelected: Democracy and the New Separation of Powers 3 (2007).

[60] E.g. Alec Stone Sweet, Governing with Judges (2000); Ran Hirschl, *Judicialization of Politics, in* The Oxford Handbook of Law and Politics (Gregory Caldeira et al., 2008).

[61] Leonard Besselink, *The Proliferation of Constitutional Law and Constitutional Adjudication, or How American Judicial Review Came to Europe After All*, 9 Utrecht L. Rev. 19 (2013).

[62] Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 79 (1999).

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courts (ICs) were designed to influence state behavior and shift states towards compliance with international law. During the past decades, many ICs have undergone significant transformations. Scholars even refer to a paradigm shift in their creation and use.[63] At least some of the "new" ICs have become more powerful and fulfill roles that go far beyond merely resolving inter-state disputes. There is also wider access to ICs, further domestic embeddedness, and some ICs have gained a higher degree of independence from state control.[64] As a result, the authority of ICs—the ECtHR among them at the forefront—and their power to alter domestic politics has notably increased.[65] A related issue is the populist resentment towards international human rights law, especially towards its universalistic aspirations. International human rights norms are viewed as particularly non-democratic and individualistic obstacles to domestic popular will and identity.[66] As a result, there is a certain irritation of populism with international human rights courts and quasi-judicial bodies, as well as with non-governmental organizations (NGOs) helping to bring cases before those bodies.[67]

The rise of ICs illustrates a more general tendency—the internationalization of limits imposed on majoritarian governance. Globalization and the increased influence of international organizations, international NGOs, and corporations have been understood by populism as external obstacles constraining the realization of the authentic popular will by the international unaccountable elites. Populists thus commonly include international actors and the national leaders supporting them in the narrative of blame.[68] In Europe, populism is regularly coupled with Euroscepticism criticizing the elitist and non-representative nature of European integration.[69]

According to Posner, recent events even show that the post-Cold War liberal internationalism might have reached its limits.[70] The benefits of globalization were not equally distributed, and many have the feeling of being left behind by globalization and international institutions.[71] Populist leaders have been able to argue that international decision makers act in the interest of elites, not ordinary people. As a result, "international institutions have provided a convenient target for populists, as have the national leaders who have supported them. The populists have been able to blame globalization and international law for insecurity and economic dislocation as a way to undermine the establishment elites who constructed them."[72]

63 Karen Alter, The New Terrain of International Law 3 (2014).

64 Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 int'l org. 457, 469 (2000); Karen Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 L. & Contemp. Probs. 37 (2008).

65 Karen Alter, *Tipping the Balance: International Courts and the Construction of International and Domestic Politics*, 13 Cambridge Yearbook of European Legal Studies 1 (2011). But see *infra* note 97, and Section 3 of this article.

66 Blokker, *supra* note 41.

67 Philip Alston, *The Populist Challenge to Human Rights*, 9 J. Hum. Rts. Prac. 1 (2017).

68 Rodrik, *supra* note 53, at 25.

69 Paul Taggart, *Populism and Representative Politics in Contemporary Europe*, 9 J. Pol. Ideologies 269, 270 (2004).

70 Eric Posner, *Liberal Internationalism and the Populist Backlash*, 49 Arizona St. L. J. 795, 812–13 (2017).

71 Michael J. Trebilcock, Dealing with Losers (2014).

72 Posner, *supra* note 70, at 816.

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Overall, the illiberal drive against checks and balances and against limitations on power is common for populism as an ideology and for the politics of populist strongmen in power. However, this does not necessarily hold true for all the populist voters: "Even voters who disagree with the simplistic solutions proposed by populist leaders may find reassurance in their brazen confrontation of issues that have too long fallen outside of political discourse."[73] As Mounk has argued, support for populist actors is mostly driven by the people's anxiety about the future, and fear of losing their current identitarian, economic, and social status.[74] In this respect, it is reasonable to admit that populism identifies some important problems of liberal constitutional democracy which have been overlooked or silenced for a long time—especially the tension between individualism and cosmopolitanism on the one hand, and collectivism and particularism on the other hand.[75] Arditi therefore likens populism to an "awkward dinner guest" who drank too much and asked inappropriate questions contrary to good table manners. These questions may nevertheless point to some significant hidden problems.[76]

How do the ICs and the ECtHR in particular fit in? Identitarian and democratic deficits of judicialized and internationalized governance belong among the overlooked problems.[77] It is fair to say that the ECtHR judicializes many areas, including core moral and political issues (such as security or immigration) that are of utmost concern to the people. Although there are good arguments in favor of the ECtHR's involvement in these areas, their judicialization "comes with a price."[78] One should acknowledge that judicializing such issues by an IC can contribute to their de-politicization and, thereby, to the anxiety of the people stemming from the lack of control over these pressing issues.[79] Thus, although one does not need to support the simplistic solutions offered by the populist leaders and the narratives about international governance as an elitist conspiracy, taking into account the contribution of international judicialization to the frustration and anxiety of the people helps to understand the support for such solutions. This is an aspect which makes the populist narrative of blame so appealing to many people and, at the same time, so threatening for the ECtHR.

To be clear, ICs, and the ECtHR in particular, have always been challenged.[80] Recently, the Strasbourg Court has been criticized by many audiences, including

[73] Sophia Gaston quoted in Judy Dempsey, *Does Europe Have an Alternative to Populism?* Carnegie Europe (Aug. 30, 2018) *available at* http://carnegieeurope.eu/strategiceurope/77134?lang=en.

[74] Yascha Mounk, The People vs. Democracy 157 (2018). *See also* Eefje Steenvoorden & Eelco Harteveld, *The Appeal of Nostalgia: The Influence of Societal Pessimism on Support for Populist Radical Right Parties*, 41 West Eur. Pol. 28 (2018).

[75] Neil Walker, *Populism and Constitutional Tension*, 17 Int'l J. Const. L. 515 (2019).

[76] Benjamin Arditi, Politics on the Edges of Liberalism 78 (2007).

[77] Doreen Lustig & J. H. H. Weiler, *Judicial Review in the Contemporary World—Retrospective and Prospective*, 16 Int'l J. Const. L. 315, 338–45 (2018); Mounk, *supra* note 74, at 70–77; Walker, *supra* note 75.

[78] Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, 20 Ger. Law J. 225, 236 (2019).

[79] *Id.*, at 242. On the other hand, judicialization of political issues tends to produce politicization of courts. *See* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & Contemp. Probs. 41, 64 (2002).

[80] Kanstantsin Dzehtsiarou, European Consensus and the Legitimacy of the European Court of Human Rights 146 (2015).

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national governments, judges, scholars, and the mainstream media. And although such criticism has sometimes made use of elements of the populist logic, this article argues that the populist challenge is particularly serious for the ECtHR. Although a thin ideology, populism provides a complex view of how democracy should work. The populist reading of the abovementioned concepts has strong implications and results in a particular constitutional vision. That vision contrasts with independent and effective international human rights adjudication. The high impact of an international human rights court is seen not only as unsuitable, ineffective, or lacking democratic legitimacy. Populism provides a basis for criticizing such a practice as immoral, and as being hostile to the people and democracy as such. As a result, it offers an alternative constitutional project competing with pan-European liberal constitutionalism. Another essential feature of populism is its broad appeal and capacity to mobilize the masses. Issues concerning the legitimacy of ICs are most often formulated by elite actors from legal and political spheres.[81] However, populism elevates this to another level. The populist narrative centered around the popular will; socioeconomic and identity concerns seem to have a higher capacity to mobilize and unite people—possibly even across borders—than the sovereigntist or counter-majoritarian critique of ICs alone.[82]

However, populists in government use institutions in an instrumental way. They oppose and attack those institutions whose outcomes are not in line with their interests. As Müller put it, "[p]opulists are only against specific institutions—namely those which, in their view, fail to produce the morally … correct political outcomes. But this form of 'anti-institutionalism' is only articulated when populists are in opposition. Populists in power will be fine with institutions—which is to say: *their* institutions."[83] In practice, (authoritarian) populists in government show a clear tendency to adjust the institutional landscape to their constitutional visions. Throughout the world, they have been trying to eliminate limitations on their executive power, change the electoral rules, and restrict the independent media and civil society organizations if these fail to produce their preferred outcomes.[84] If they cross the interest of the populist leaders, courts are usually among the first targets of the populist push against checks and balances.[85] Nevertheless, populists in power do not need to abolish courts. It is sufficient to prevent courts from imposing limits on the executive. Two general strategies are most often used to achieve that: limiting a court's ability to interfere with the given agenda (e.g. by jurisdiction stripping, paralyzing the court), and "taming" the court by targeting the judicial personnel and harmonizing its outcomes with the populist objectives.[86]

[81] Basak Çalı, Anne Koch, & Nicola Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 Hum. Rts. Q. 955, 962 (2013).

[82] In detail, *see* Section 3.3 providing actual examples.

[83] Jan-Werner Müller, *Populism and Constitutionalism*, *in* The Oxford Handbook of Populism 590, 598 (Cristóbal Rovira Kaltwasser et al., 2017).

[84] David Landau, *Populist Constitutions*, 85 U. Chicago L. Rev. 521, 532 (2018); Müller, *supra* note 19.

[85] *See* Bojan Bugarič & Tom Ginsburg, *The Assault on Postcommunist Courts*, 27 J. Democracy 69, 73 (2016); Steven Levitsky & Daniel Ziblatt, How Democracies Die 78–81 (2018).

[86] Those strategies were visible for instance in the attacks on constitutional courts in Hungary and Poland—*see* Bugarič & Ginsburg, *supra* note 85.

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What do the ideological underpinnings of populism and the populists leaders' tendency to attack courts imply for the ECtHR? Many of the reasons for populist irritation with powerful domestic courts are very relevant for the Strasbourg Court. The ECtHR has elevated human rights standards in Europe through its dynamic interpretive methods.[87] Its case law has permeated the jurisprudence of domestic courts,[88] influenced national statutes and constitutions,[89] and altered domestic political agendas.[90] Specifically in the "new" European democracies, the ECtHR's case law has also served as a human rights handbook,[91] and an instrument to lock in democratic developments and prevent backsliding.[92]

In addition, the ECtHR's case law is built on values that are at odds with the populist ideology. The Strasbourg jurisprudence builds on individual rights, social pluralism, universalism, and the protection of minorities. In fact, the Strasbourg Court has already countered some policies of the populist leaders. To name a few examples, during the 2005–07 populist era in Poland, the ECtHR ruled that Lech Kaczynski's decision to ban a gay rights march in Warsaw violated the Convention.[93] More recently, the ECtHR addressed some of the restrictions upon freedom of expression in the aftermath of the failed *coup d'état* in Turkey.[94] Several Strasbourg judgments have concerned Orbán's populist regime in Hungary too, in particular its immigration policies[95] and the dismissal of András Baka from the post of president of the Hungarian Supreme Court.[96]

All these aspects suggest that the ECtHR's performance conflicts with populism. Given the abovementioned tendency of authoritarian populist leaders to eliminate institutions that counter their political project, the rest of this article takes stock of the ECtHR's resilience. Section 3 examines the ECtHR's setting through the prism of

[87] Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 12 Ger. Law J. 1730 (2011).

[88] Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law 86 (Janneke Gerards & Joseph Fleuren eds., 2014).

[89] David Kosař & Lucas Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109 Am. J. Int'l L. 713 (2015); The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy (Dia Anagnostou ed., 2013); Stone Sweet & Keller, *supra* note 1.

[90] Laurence Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 Int'l Org. 77 (2014).

[91] Iulia Motoc & Ineta Ziemele eds., The Impact of the ECHR on Democratic Change in Central and Eastern Europe (2016).

[92] Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217 (2000).

[93] *Baczkowski and others v. Poland*, App. No. 1543/06, Eur. Ct. Hum. Rts., May 3, 2007. Ben Stanley, *Confrontation by Default and Confrontation by Design: Strategic and Institutional Responses to Poland's Populist Coalition Government*, 23 Democratization 263, 273–74 (2016).

[94] *Alpay v. Turkey*, App. No. 16538/17, Eur. Ct. Hum. Rts., March 20, 2018; *Altan v. Turkey*, App. No. 13237/17, Eur. Ct. Hum. Rts., March 20, 2018.

[95] E.g. *Ilias and Ahmed v. Hungary*, App. No. 47287/15, Eur. Ct. Hum. Rts., March 3, 2017.

[96] *Baka v. Hungary*, App. No. 20261/12, Eur. Ct. Hum. Rts., June 23, 2016; David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 Hague J. Rule of Law 83 (2018). *See* Section 3.3 for more examples of clashes between populists and the ECtHR.

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Table 1. Anti-court techniques

Structural features of a court	Judicial personnel	Social legitimacy
Abolishing a court	Removing disloyal judges	Exit
Jurisdiction stripping	Making judges loyal	Exit threats
Changing access and procedural rules	Appointing loyal judges	Criticism
Intervening in the internal workings of a court		Non-compliance
Docket control		
Restricting budget		

the most common anti-court techniques, and seeks to identify the risks and resources built into the Strasbourg Court's design.

3. Stocktaking the ECtHR's independence safeguards

Backlashes against (international) courts are not a new phenomenon.[97] Throughout history, there have been many attempts to limit or control both domestic and international judiciaries, using various anti-court techniques.[98] This section examines the ECtHR's setting through the prism of the most common anti-court techniques. Table 1 introduces their novel categorization built on an extensive survey of secondary literature on limiting judicial power and disciplining both domestic and international judges. The common denominator of the techniques is the effort to decrease the court's authority and capacity to act as a veto point. They are categorized according to the target of the technique—the structural features of a court, its judges, and its social legitimacy. The identified techniques are not distinctively populist. They can be employed by actors of any political affiliation. The categorization can therefore be used for the analysis of various challenges to any court. But since Section 2 argued that populism made targeting courts more likely and presents an imminent challenge for the Strasbourg Court, the point here is to assess the strengths and weaknesses of the ECtHR system and find out how well-designed the Strasbourg Court is to withstand the eventual use of those techniques.

[97] In recent scholarship, *see* Wayne Sandholtz, Yining Bei, & Kayla Caldwell, *Backlash and International Human Rights Courts*, *in* Contracting Human Rights 159 (Alison Brysk & Michael Stohl eds., 2018); Mikael Rask Madsen, Paula Cebulak, & Micha Wiebusch, *Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 Int. J.L. in Context 197 (2018); Erik Voeten, *Populism and Backlashes against International Courts*, Perspectives on Politics (forthcoming).

[98] The term "anti-court techniques" is a simplification. Some of the techniques can be used in legitimate ways to promote judicial accountability or efficiency. In this article, however, I stress their negative potential and focus on instances when the techniques are employed in a "wicked" way.

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3.1. Targeting the ECtHR's structural features

One of the goals of targeting the judiciary is to limit courts' ability to interfere with the populist agenda. The most straightforward way is to *abolish the court* and eventually replace it with a new institution.[99] Courts' power can also be reduced by *jurisdiction stripping*.[100] A different technique used for preventing a court from deciding certain cases is *changing the rules of access*. Making access to the court difficult can lead to control of the court's docket.[101] A powerful tool capable of paralyzing a court is *changing procedural rules and intervening in the inner working of the court*. Raising the majority necessary for adopting a decision or introducing strict rules on the order of dealing with cases, for instance, can reduce a court's agility.[102] *Reducing the budget* of a court represents another technique.[103] Budgetary constraints can be used by states and international organizations to discipline or reward a court for its decisions and functioning.[104] Besides that, having an insufficient budget can paralyze a court as it prevents it from functioning properly. Budgetary support has important implications for the working conditions at a court—IT support and other equipment, building maintenance, number of personnel, etc.[105]

With the exception of the budget, the ECtHR is quite well protected against attacks on its structural features. The main strengths of the Strasbourg system are its *decentralization*, which leads to de facto entrenchment of the fundamental features of the ECHR, and a notable degree of *judicial self-governance*. These two features make many of the listed anti-court techniques impossible or very hard to employ.

By *decentralization* I mean the plurality of governing actors. The ECtHR is part of the Council of Europe (CoE), which consists of forty-seven member states who are the masters of the Convention. The Convention itself regulates the most critical issues concerning the structural features of the ECtHR, such as the inner structure of the Court, its jurisdiction and competences, access rules, etc. Thus, the states parties have to contend with a particularly high threshold for changing the structural features of the ECtHR. They face a "joint decision trap,"[106] where higher level decisions (decisions regarding the ECtHR) can be blocked by any lower level actor (a CoE state). It implies

[99] Levitsky & Ziblatt, *supra* note 85, at 80–81.

[100] David Kosař, Perils of Judicial Self-Government in Transitional Societies 95–96 (2016); Keith Rosenn, *The Protection of Judicial Independence in Latin America*, 19 Inter-American L. Rev. 1, 24 (1987).

[101] Fruzsina Gárdos-Orosz, *The Hungarian Constitutional Court in Transition—from Actio Popularis to Constitutional Complaint*, 53 Acta Juridica Hungarica 302 (2012).

[102] Wojciech Sadurski, Poland's Constitutional Breakdown 61–79 (2019), mapping the paralysis of the Polish Constitutional Tribunal.

[103] Although budgetary constraints stand out somewhat among other techniques targeting the structural features of a court, I include them in this category since they target the whole court rather than individual judges and, like the other structural techniques, can impair the court's capacity to act.

[104] Tom Ginsburg, *Political Constraints on International Courts*, *in* The Oxford Handbook of International Adjudication 484, 493 (Cesare Romano et al., 2013).

[105] Kosař, *supra* note 100, at 94.

[106] Fritz Scharpf, *The Joint-decision Trap: Lessons from German Federalism and European Integration*, 66 Pub. Admin. 239 (1988); R. Daniel Kelemen, *The Political Foundations of Judicial Independence in the European Union*, 19 J. Eur. Pub. Pol'y 44 (2012).

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that the structural features of the Strasbourg Court, which are enshrined directly in the Convention, are de facto entrenched.

In this way, the Strasbourg Court is protected from the most straightforward attacks targeting structural features. Abolition of the ECtHR, jurisdiction stripping as well as changing the access and (some of) the procedural rules all require the Convention to be amended. Given the number of states parties and their political diversity, it is unlikely that there would be no veto players to block an attack of this kind. However, that does not mean that individual states or groups of like-minded states cannot start a campaign against the Court and informally, through political channels, influence its functioning.[107]

The second strong feature is the high degree of *judicial self-governance* (JSG) in matters of the inner working of the Court.[108] Its basic aspects are included in the Convention. Particular decisions on the inner workings of the ECtHR are then made by the Strasbourg judges themselves. The Rules of Court, adopted by the Strasbourg judges, regulate procedural rules that could eventually be misused in order to attack the ECtHR, such as the order of dealing with cases or voting and the necessary majorities to adopt a decision.[109] Hence, trying to paralyze the Strasbourg Court by changing the procedural rules would be very complicated due to the combination of decentralization and JSG.

This combination of decentralization and JSG also protects the Strasbourg Court from meddling in the composition of the chambers and targeting the key personnel in the Registry. The Convention stipulates that the ECtHR consists of the plenary court and the chambers, that it shall have a Registry and that there should be a President and one or two Vice-Presidents of the Court. Exercising JSG, the ECtHR judges themselves set up the chambers, elect the President, Vice-President(s), Registrar, and deputy Registrar(s), and adopt the rules of the Court (Article 25 ECHR). The rules of the Court then specify the inner functioning of the ECtHR with respect to the Presidency of the Court, the Registry, the forming and functioning of the chambers (sections), committees, and single-judge formations, as well as sessions and deliberations of the Court.

The strategy of budgetary restrictions remains to be addressed. The Strasbourg Court does not have a separate budget; it forms a part of the overall CoE budget, which is subject to the approval by the Committee of Ministers (CoM).[110] CoE as such is financed by the forty-seven member states. The contribution of each state is fixed, taking into account the population and GNP of the state.[111] Therefore, the contributions by states are not equal, which problematizes the logic of the decentralization argument. A major

[107] *See* Section 3.3.

[108] On JSG at the ECtHR, *see* Başak Çalı & Stewart Cunningham, *Judicial Self Government and the Sui Generis Case of the European Court of Human Rights*, 19 Ger. Law J. 1977 (2018); Nino Tsereteli & Hubert Smekal, *The Judicial Self-Government at the International Level—A New Research Agenda*, 19 Ger. Law J. 2137 (2018).

[109] ECtHR, Rules of Court (Apr 16, 2018), *available at* https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

[110] ECHR Budget, *available at* http://www.echr.coe.int/Documents/Budget_ENG.pdf.

[111] *Id.*

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donor's failure to contribute can harm the ECtHR's situation significantly. Moreover, according to Lambert-Abdelgawad, the Strasbourg Court is "evidently under-funded," given its caseload.[112] That has gotten even worse recently since Russia—one of the major contributors—announced in 2017 it would stop contributing to the CoE budget.[113] In addition, Turkey also withdrew from its status as a major donor to the CoE budget.[114] These developments may lead to further reductions in the ECtHR's under-funded budget and significantly impair the Strasbourg Court's effectiveness.[115]

3.2. Targeting judicial personnel

Since courts consist of individual judges who are crucial for the court's decision-making, many anti-court techniques aim to "tame" the judicial personnel. There are two main ways to do this: install new loyal judges or make the incumbent judges loyal. Appointing loyal judges requires the removal of disloyal judges, or the possibility to "pack" the court, that is, increase its size and fill the bench with loyalists.[116]

Judges can be removed using various techniques, including *impeachment*[117] or misuse of *disciplinary motions*.[118] A less straightforward move is to *reduce the salary* of a judge or judicial salaries as such, which may force some judges to resign.[119] Another possibility is *to reduce the compulsory retirement age* of judges.[120] The last technique is *intimidation of individual judges*. Intimidating phone calls to a judge or her family, threats, or even physical intimidation can all create a climate of fear, which may lead a judge to resign.[121] Once places on the bench are vacant, the actors aiming to tame the court can appoint loyal figures to the bench. Sometimes, though, they do not bother to remove the incumbent judges but rather pack the court—they increase the number of judges and fill the new positions with loyalists.[122]

[112] Elizabeth Lambert Abdelgawad, *Measuring the Judicial Performance of the European Court of Human Rights*, 8 Int'l J. Ct. Admin. 20, 23 (2017).

[113] This step was a response to the decision of the Parliamentary Assembly of the Council of Europe (PACE) to suspend Russia's voting rights in the Assembly in reaction to the 2014 occupation of Crimea. PACE, Resolution 1990 (2014), *available at* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=20882&lang=en.

[114] Jennifer Rankin, Human rights body faces cash crisis after clash with Russia, Guardian (Mar 16, 2018), *available at* https://www.theguardian.com/law/2018/mar/16/human-rights-body-faces-cash-crisis-after-clash-with-russia?CMP=share_btn_tw.

[115] Lize Glas, *The Assembly's Row with Russia and Its Repercussions for the Convention System*, Strasbourg Observers (Oct 30, 2017). *available at* https://strasbourgobservers.com/2017/10/30/the-assemblys-row-with-russia-and-its-repercussions-for-the-convention-system/.

[116] Andrea Castagnola & Aníbal Pérez Liñan, *Bolivia: The Rise (and Fall) of Judicial Review*, *in* Courts in Latin America 278, 303 (Gretchen Helmke & Julio Rios-Figueroa eds., 2014).

[117] *Id.*, at 297–8.

[118] Kosař, *supra* note 100, at 77.

[119] Castagnola & Pérez Liñan, *supra* note 116, at 283, 296 and 298.

[120] E.g. Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, *in* EU Law Stories: Contextual and Critical Histories of European Jurisprudence 471, 488 (Fernanda Nicola & Bill Davies eds., 2017).

[121] Jessica Walsh, *A Double-Edged Sword: Judicial Independence and Accountability in Latin America*, 1, 23 Int'l Bar Ass'n Rep. (2016).

[122] Bugarič & Ginsburg, *supra* note 85, at 73.

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Another way to tame a court is to make the current judges loyal. That can be done through *threatening* to employ the techniques described for removing judges. Yet, using *carrots* instead of sticks can work as well. Incumbent judges can be promised a *promotion*, perhaps to a higher court, to the position of chamber president, or (vice-) president of a court.[123] Alternatively, current judges can be promised higher salaries or even direct *bribes*. An important and highly debated technique is the *reappointment of judges.*[124] Some courts—mostly constitutional and international courts—provide for limited but renewable terms. In such cases, political actors can use their power of reappointment to make judges decide in their preferred direction. Finally, even if reappointment is not allowed, judges serving a limited term will likely care about their future career, thus they are largely dependent on the government to secure them comparable positions. That fact can be used to put pressure on a judge.[125] Given the nature of international judgeship—time-limited terms, location in a foreign country, etc.—some of those carrots may be particularly tempting in the context of an IC.

The Strasbourg Court is relatively well designed to prevent or resist techniques targeting judicial personnel. The main advantages of the system are *decentralization*, strong *judicial independence safeguards*, the *JSG* element in the selection of judges, and notable *JSG* in promoting and disciplining judges.

Misusing disciplinary motions is difficult because of the disciplinary self-governance of ECtHR judges, combined with its de facto entrenchment in the Convention.[126] As a result, influencing the Court through affecting dismissal proceedings is unlikely. Observation of practice confirms this. The dismissal mechanism has not been used yet.[127] As to the possibility of salary reduction, judicial salaries are linked to the pay scale for CoE staff members based in France.[128] In 2016, the gross salary was €16,613.78 per month[129] and the salary is not subject to income tax.[130] Such financial security seems to be sufficient to secure judicial independence, especially when compared to other international human rights courts. A judge's position at the IACtHR, for instance, is not full-time and the judges therefore do not receive regular salaries but only "emoluments and travel allowances … for the importance and independence of their office."[131]

[123] Kosař, *supra* note 100, at 83, 85–86.

[124] Laurence Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, 23 Conf. New Pol. Econ. 253 (2005).

[125] Erik Voeten, *International Judicial Independence*, in Interdisciplinary Perspectives on International Law and International Relations 421, 433 (Mark Pollack & Jeffrey Dunnof eds., 2012).

[126] Article 23 (4) ECHR.

[127] Jeffrey Dunoff & Mark Pollack, *The Judicial Trilemma*, 111 Am. J. Int'l L. 225, 249 (2017).

[128] Article 3 (1), Committee of Ministers Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights (2009).

[129] According to the information provided by the UK Judicial Appointments Commission—*Judge of the European Court of Human Rights—Information Pack*, *available at* https://www.judicialappointments.gov.uk/sites/default/files/sync/basic_page/information_pack_final_0.pdf.

[130] Article18b of the General Agreement on Privileges and Immunities of the Council of Europe.

[131] Article 72 ACHR.

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The logic of decentralization applies to attempts to lower the retirement age of ECtHR judges. The expiry of judicial office is set at the age of 70 and is "entrenched" directly in the Convention [Art 23 (2)]. Protocol 15, however, changes this rule. It introduces a new requirement that candidate judges cannot be older than 65, which implies an age limit of 74. It shows that amending the ECHR is not impossible and that the Strasbourg Court is not beyond control. However, bad faith amendments can be blocked by a state party.[132] To address the last technique, the option of intimidating judges exists and cannot be completely prevented. At least ECtHR judges enjoy diplomatic immunity which can be waived only by a decision of the Court. Such immunity should protect the ECtHR judges from intimidation through domestic legal proceedings.

Another set of techniques concerns efforts to make incumbent judges loyal. Four main techniques have been identified—reappointment, a promise of promotion, a promise of future career opportunities, and bribes. The combination of judicial independence safeguards and of JSG protects the Strasbourg Court quite well from attempts to tame current judges.

As to the reappointments, after several instances of governments' alleged revenge (non-reappointment) against their national judges for "wrong" opinions[133] and scholarly criticism, the possibility of reappointment was abolished.[134] Since 2010, judicial terms at the ECtHR are for nine years and are non-renewable.[135] Nevertheless, reappointment is not the only career incentive a government can promise to an incumbent judge. IC judges—especially if their term is non-renewable—have to deal with the question of post-IC careers. Thus, governments can put some pressure on judges by promising them positions in other institutions.[136] It is difficult to prevent this technique at the CoE level. One precaution is the pension scheme. ECtHR judges who join the pension scheme and spend at least five years in office are eligible for a retirement pension from the CoE once they reach the age of 65.[137] This mechanism should at least partially enhance the independence of the Strasbourg judges since it grants them the security of a pension. Other measures can be taken by the states. Some countries, for instance, permit judges going to the ECtHR to suspend their domestic positions, with the option to return to their original jobs after serving a term in Strasbourg.[138]

The technique of taming judges through promises of promotion is unavailable since the ECtHR enjoys JSG in this area. The selection of the President and Vice-President(s) of the Court and of the Chamber Presidents is in the hands of the plenary Court (Article

[132] Generally Geir Ulfstein & Andreas Føllesdal, *Copenhagen—Much Ado about Little?* Eur. J. Int'l L. Talk! (Apr 14, 2018), *available at* https://www.ejiltalk.org/copenhagen-much-ado-about-little/.

[133] *See* Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 Am. Pol. Sci. Rev. 417, 421 (2008).

[134] Dunoff & Pollack, *supra* note 127, at 250–51.

[135] Article 23 (1) ECHR.

[136] Voeten, *supra* note 125, at 433.

[137] For further details, see Article 10 (3) of Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights.

[138] Boriss Cilevičs, *Reinforcement of the Independence of the European Court of Human Rights*, PACE Report (2014), *available at* http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20933&lang=en.

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25 ECHR). Yet another, albeit criminal, way to influence current judges is bribery. The potential for corruption is always present and no formal rules can absolutely prevent it. The strength of the ECtHR system in this regard is the relative material security of the Strasbourg judges. Nonetheless, it can be suggested that the ECtHR is as cautious and transparent as possible in order to prevent to prevent possible corruption scandals, which could have particularly damaging effects on the ECtHR's legitimacy.

From a comparative perspective, an often-used way of taming a court is court-packing. However, the employment of such a technique in the ECtHR context is highly unlikely. Again, it is due to the decentralization of the system and the de facto entrenchment of the number of judges in Article 20 of the Convention. However, governments aiming to tame the ECtHR can try to place a loyal individual in the position of their country's judge at the Strasbourg Court. In theory, this should not be easy, especially due to two safeguards: the Advisory Panel of Experts on the selection of judges[139] and the election of judges by PACE. The advisory panel advises the states and PACE on whether the candidates they shortlist as ECtHR judges meet the required criteria. Its views are only recommendatory though. Strasbourg judges are ultimately elected by PACE, which consists of representatives from all the CoE member states, and thus the decentralization logic should apply. Yet, in practice the decentralization argument is not as strong. As Lemmens put it, "as long as the Convention hallows the idea of democratically elected judges, we have to accept the flip side of this coin: lobbying, political games, international wheeling and dealing."[140] Most importantly, as relatively few PACE members participate in the vote, the threshold for lobbying is rather low.[141] This shortcoming of the election process should be addressed since the ability to control the ECtHR through individual judges can become critical at a certain point. The election of incompetent or biased judges can largely harm the legitimacy and reputation of the Court.[142] Furthermore, single judges are quite powerful actors in the ECtHR context. They can publish dissenting opinions and, as a part of the single-judge formation, they can dismiss applications as manifestly unfounded.[143]

3.3. Gradual erosion through shifting the discourse and delegitimizing a court

The two main strategies of attacking courts mentioned so far have been rather straightforward. Targeting the structural features of a court aims to limit the chances of a court interfering. Taming a court through its judicial personnel can lead to greater judicial deference, harmonizing the decisions of the court with the preferences of political actors and, ultimately, stripping the court of its de facto veto power. With respect

[139] The panel consists of seven judicial experts—current or former ECtHR judges or high court judges from the states parties.

[140] Koen Lemmens, *(S)electing Judges for Strasbourg*, in Selecting Europe's Judges 95, 108 (Michal Bobek ed., 2015).

[141] *Id.*, at 108; David Kosař, *Selecting Strasbourg Judges*, in Selecting Europe's Judges 120, 154 (Michal Bobek ed., 2015).

[142] Çalı et al., *supra* note 81.

[143] Article 27 (1) ECHR.

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to the Strasbourg Court, both strategies seem rather unlikely at this point. Although the situation is not perfect—the budget and judicial selection are especially problematic—the ECtHR is rather well insulated from attacks due to decentralization, JSG,[144] and institutional safeguards of judicial independence.

However, such insulation does not mean that the ECtHR cannot be challenged by populists. In the context of the international human rights judiciary in particular, there is another way to attack a court—sidelining it by shifting the discourse about the court and delegitimizing it, which may lead to gradual erosion of its authority. Such a strategy is slower and less straightforward. However, it is a more realistic and more dangerous scenario in the ECtHR context. Whereas the previous two strategies require the concerted action of many governments or measures that can be very costly politically, attacking the ECtHR through delegitimization is more likely.

A decrease of social legitimacy can be very threatening for the Strasbourg Court. Delegitimizing techniques can shift the discourse about a court and initiate a dangerous spiral—lower legitimacy implies a risk of reducing the court's effective power in future cases.[145] That poses a major challenge for the court's effectiveness and increases the risk of its marginalization. This makes eventual attacks on the court's institutional framework and judicial personnel less costly in political terms and, thereby, more likely. In other words, since the social legitimacy of a court and its diffuse support serve as a bulwark of judicial independence, their loss or decrease opens an opportunity for further attacks on a court.[146]

In order to shift the discourse and delegitimize an IC, a number of techniques can be used which broadly fall within two classical categories: exit and voice.[147] *Exit* is a straightforward technique of getting an IC out of the government's way. States can withdraw from the jurisdiction of an IC, or exit the international regime guarded by the IC.[148] Exit can be viewed as a delegitimizing strategy due to its broader consequences. Most importantly, it tends to decrease the social legitimacy and authority of a court, as the recent exit-talk surrounding the ICC exemplifies.[149] Moreover, if one state realizes the exit option, or even seriously considers it, this may spread and encourage other states to do so.[150] In addition, exit can lead other states parties to restrict the jurisdiction of an IC in order to prevent future exits.[151] Even if a state does not exit in the end,

[144] In the ECtHR's case, JSG was identified as a strength bolstering the Strasbourg Court's independence and authority. Generally, however, JSG is a double-edged sword that can also diminish the internal independence of judges. *See* Michal Bobek & David Kosař, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 Ger. Law J. 1257 (2014).

[145] Ginsburg, *supra* note 104, at 491.

[146] Kelemen, *supra* note 106, at 45.

[147] Albert Hirschman, Exit, Voice and Loyalty (1970).

[148] For example, Venezuela and Trinidad and Tobago withdrew from the ACHR. Another recent example is Burundi's exit from the ICC. *See* Sandholtz et al., *supra* note 97, at 159.

[149] Laurence Helfer & Anne Showalter, *Opposing International Justice: Kenya's Integrated Backlash Strategy Against the ICC*, 17 Int. Crim. L.Rev. 1 (2017).

[150] Latin American countries' withdrawal from ICSID exemplifies this. *See* Ginsburg, *supra* note 104, at 493.

[151] *See* the example of the SADC Tribunal. Karen Alter, James T. Gathii, & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 Eur. J. Int'l L. 293, 314 (2016).

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mere *exit threats* can also be used to intimidate an IC and send it a strong signal of discontent.[152]

Exit threats can be a part of a more general strategy of rhetorical criticism of a court. Raising a voice to *criticize a court* is a powerful rhetorical tool, which can eventually damage the authority of a court among its compliance constituencies. It may be a particularly effective tool with powerful states, especially as the anti-court rhetoric tends to spread.[153] A specific way to criticize a court is to mobilize public opinion against it.[154] On the one hand, ICs have always been criticized, and this is not necessarily bad for an IC. Questioning an IC's conclusions and providing alternative interpretations of international law serve as an important feedback channel.[155] ICs should not be insulated from criticism. Fair contestation of their case law contributes to the development of international law and, if an IC shows that it actually listens, the criticism may even be fruitful for its own legitimacy.[156] Thus, not all criticism of the ECtHR can be seen as unjustified populist demagoguery. While a clear line can be hard to find, the following factors may help to distinguish the two. Although critical, fair contestation accepts the main rationale of the ECHR system—human rights protection beyond the state—and respects the ECtHR's independence. Moreover, productive criticism should be led in language allowing mutual accommodation of differing views, rather than in denouncing and using fear-inciting terms.

The last technique is *non-compliance* with judicial decisions. Although inducing compliance is not the only goal of ICs,[157] it remains one of the central measures of their effectiveness, because courts tend to lose legitimacy if their decisions are routinely and openly ignored.[158] To be clear, partial or delayed compliance with judicial decisions seems to be quite a standard outcome in the case of international human rights courts.[159] However, it can also be used to challenge an IC's legitimacy.[160] In other words, there is a difference between non-compliance resulting from a lack of expertise and institutional capacities[161] and non-compliance as a "nullificationist strategy."[162] Large-scale non-compliance can make a court ineffective, which likely leads to a loss

[152] Ginsburg, *supra* note 104, at 491.

[153] Philip Leach & Alice Donald, *Russia Defies Strasbourg: Is Contagion Spreading?* Eur. J. Int'l L.: Talk! (Dec 19, 2015), *available at* https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/.

[154] Ginsburg, *supra* note 104, at 493.

[155] Mikael Rask Madsen, *Bolstering Authority by Enhancing Communication: How Checks and Balances and Feedback Loops Can Strengthen the Authority of the European Court of Human Rights,* in Allocating Authority 77 (Joana Mendes & Ingo Venzke eds., 2018).

[156] André Nollkaemper, *Conversations among Courts: Domestic and International Adjudicators, in* The Oxford Handbook of International Adjudication 524, 536–37 (Cesare Romano et al., 2013).

[157] Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 Am. J. Int'l L. 225 (2012).

[158] Voeten, *supra* note 125, at 436.

[159] Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American American Courts for Human Rights*, 6 J. Int'l L. Int'l Rel. 83 (2010).

[160] Helfer, *supra* note 124.

[161] Dia Anagnostou & Alina Mungiu-Pippidi, *Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter* 25 Eur. J. Int'l L. 205, 207 (2014).

[162] Hirschl *supra* note 52, at 18.

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of legitimacy and diffuse support. Even a single "noisy act of non-compliance" by a powerful state can have damaging consequences for a court's legitimacy.[163]

The ECtHR's resilience to the listed delegitimizing techniques is problematic. In fact, this area reveals the Strasbourg Court's greatest vulnerability. The past decade gave rise to unprecedented criticism of the ECtHR, and included many of the listed delegitimizing techniques. Although the ECtHR has been subject to criticism ever since its establishment,[164] the criticism has recently intensified and a new genre of "Strasbourg bashing" has emerged.[165] Besides criticism focusing on the legal quality of the ECtHR's case law and on the judicial virtues of Strasbourg judges,[166] contestation of the ECtHR has centered around the Strasbourg Court's lack of legitimacy to interfere with domestic policies due to its international and judicial nature.[167] The criticism echoes the sovereigntist criticism of international institutions and critique of the undemocratic nature of judicial review. The Strasbourg Court has been portrayed as a foreign court which is not well-placed to assess domestic legal practice. In addition, it has been questioned whether unelected foreign judges should second-guess decisions of legitimate domestic parliaments.[168] This type of criticism intensified in the UK in response to Strasbourg rulings addressing sensitive political topics such as the expulsion of terrorists and prisoners' voting rights,[169] and subsequently migrated to other countries, most notably Russia.[170]

The rising resistance to the ECtHR materialized in the events surrounding the 2012 Brighton Conference, which discussed the ECtHR's long-term future. Prior to the conference, a position paper by the UK was leaked to the media.[171] The draft included passages along the lines of "a subtle attempt to water-down the Court's substantive jurisdiction."[172] As a result, "a pervasive air of backlash against the Court suffused

[163] Helfer, *supra* note 124.

[164] *See* Ed Bates, *The Birth of the European Convention on Human Rights—and the European Court of Human Rights*, *in* The European Court of Human Rights between Law and Politics 17 (Jonas Christoffersen & Mikael Rask Madsen eds., 2013).

[165] Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & Contemp. Probs. 141, 174 (2016); Barbara Oomen, *A Serious Case of Strasbourg-Bashing? An Evaluation of the Debates on the Legitimacy of the European Court of Human Rights in the Netherlands*, 20 Int'l J. Hum. Rts 407 (2016).

[166] *See* Luzius Wildhaber, *Criticism and Case Over-load: Comments on the Future of the European Court of Human Rights*, *in* The European Court of Human Rights and Its Discontents: Turning Criticism into Strength 10 (Spyridon Flogaitis, Tom Zwart, & Julie Fraser eds., 2013).

[167] Dzehtsiarou, *supra* note 80, at 144; Robert Spano, *The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law*, 18 Hum. Rts L.R. 473, 478–9 (2018).

[168] Popelier et al., *supra* note 3; Flogaitis et al., *supra* note 166.

[169] Ed Bates, *Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg*, 14 Hum. Rts L.R. 503 (2014).

[170] This phase of the ECtHR's legitimacy crisis is well-known and widely covered by the existing scholarship, thus I do not go into details. For book-length analysis, *see* The UK and European Human Rights: A Strained Relationship? (Katja S. Ziegler, Elizabeth Wicks, & Loveday Hodson eds., 2015); Popelier et al., *supra* note 3; Flogaitis et al., *supra* note 166.

[171] James Landale, *UK Presses for European Human Rights Convention Changes*, BBC News (Feb 29, 2012), *available at* http://www.bbc.com/news/uk-politics-17201024.

[172] Ed Bates, *The Brighton Declaration and the "Meddling Court"*, UK Human Rights Blog (2012), *available at* https://ukhumanrightsblog.com/2012/04/22/the-brighton-declaration-and-the-meddling-court/#more-13662.

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the lead up to the Brighton Conference."[173] In the end, the Brighton Declaration was a moderate outcome.[174] Still, as Madsen states, the Brighton Declaration is extraordinary compared to previous documents as it openly raises the political (and not merely technical) dimension of the question of the ECtHR's future, accompanied by very negative comments.[175] It was the first document in the history of the CoE which included measures designed to restrict rather than enhance the ECtHR's authority.[176]

Simultaneously, compliance rates with the ECtHR's judgments worsened too. Whereas in the 1990s the ECtHR's President Ryssdal stated that the ECtHR's case law has "always been complied with,"[177] today the Strasbourg Court faces various compliance difficulties, including partial compliance and non-compliance stemming from dilatoriness but also from principled resistance.[178] Accordingly, scholars speak about an implementation crisis in the ECHR system and stress the detrimental effects it has on the Court's caseload and legitimacy.[179]

All these developments illustrate the ECtHR's vulnerability in the area of legitimacy challenges. Exit proposals, questioning of the ECtHR's reputation, attempts to curtail its authority, and principled refusals to implement the Strasbourg Court's rulings have all taken place in the ECHR system in the last decade and have affected the Strasbourg Court. These developments arguably led to a shift of the center of gravity in the system in the direction of national law and politics.[180] Some authors describe it as entering the age of subsidiarity and procedural embeddedness.[181] Others argue that the ECtHR became more restrained due to the states' backlash in order to retain the support of its traditional allies.[182] Madsen showed that the Strasbourg Court tends to grant states a wider margin of appreciation.[183] Stiansen and Voeten support this conclusion and claim that since the Brighton Conference, states have also tended to appoint judges who are more restrained.[184] Nevertheless, it has apparently not stopped the growing domestic resistance (see later in this section).

[173] Laurence Helfer, *The Burdens and Benefits of Brighton*, 1 ESIL Reflections 1 (2012).

[174] *Id.*

[175] Madsen, *supra* note 165, at 169.

[176] Helfer, *supra* note 173.

[177] Rolv Ryssdal, *The Enforcement System Set up under the European Convention on Human Rights*. *in* Compliance with Judgments of International Courts 67 (Mielle Bulterman & Martin Kuijer eds., 1996).

[178] David Kosař & Jan Petrov, *Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic*, 29 Eur. J. Int'l L. 397, 399 (2018); Fiona de Londras & Kanstantsin Dzehtsiarou, *Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights*, 66 Int'l Comp. L.Q. 467, 468 (2017).

[179] Basak Cali, *Coping with Crisis: Whither the Variable Geomety in the Jurisprudence of the European Court of Human Rights*, 35 Wisconsin Int'l L. J. 237, 241 (2018); Kosař & Petrov, *supra* note 178.

[180] Jonas Christoffersen & Mikael Rask Madsen, *Postscript: Understanding the Past, Present and Future of the European Court of Human Rights*, *in* The European Court of Human Rights between Law and Politics 230 (Jonas Christoffersen & Mikael Rask Madsen eds., 2013).

[181] Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 Hum. Rts L. Rev. 487 (2014); and Spano, *supra* note 167.

[182] Øyvind Stiansen & Erik Voeten, *Backlash and Judicial Restraint: Evidence from the European Court of Human Rights*, SSRN (2018).

[183] Mikael Rask Madsen, *Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?* 9 J. Int'l Disp. Settlement 199 (2018).

[184] Stiansen & Voeten, *supra* note 182.

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Why does discourse about the ECtHR matter? Public discourse about the ECtHR crucially affects the perceptions of the Strasbourg Court, which determine its social legitimacy. As Dzehtsiarou argued, "[h]uman rights tribunals cannot function effectively if they are perceived to be illegitimate."[185] Just like any other (international) court, the ECtHR needs legitimacy support for its proper and effective functioning. Legitimacy, as the perception that a court's authority is justified,[186] is one of the crucial elements of a court's effectiveness and ability to trigger legal changes.[187] For legitimate and effective functioning, courts need the diffuse support of the public, which does not depend on short-term satisfaction with the outputs of the court.[188]

The rise of populism makes this situation critical since the ECtHR's greatest weakness matches the greatest strength of the populists. Populism is well-equipped to delegitimize courts by including them in the narrative of blame. Populist ideology provides justification for anti-court attacks, and the populist political style makes such attacks more appealing to the people. Indeed, the populist rhetorical challenges to the ECtHR intensified recently, as the following examples demonstrate.

In using the delegitimizing techniques, populist actors often voice the sovereigntist critique of the ECtHR and stress that the Strasbourg Court interferes with national policies and restricts the choices of the people, which makes it incompatible with popular sovereignty. Marine Le Pen, the leader of the French populist party, National Rally (previously National Front), stated that "the ECtHR intervenes in our internal legal order, we must return to sovereignty in this area."[189] In 2014, she suggested that France withdrew from the Convention since the Strasbourg Court had been imposing "visions that the people rejects."[190] In a similar vein, Dutch populist Geert Wilders described the position of his party as follows: "[I]f you are in favor of a democratic constitutional state, you can never be in favor of the ECHR."[191] His party has also repeatedly proposed to exit the ECHR regime.[192] In Switzerland, the Swiss People's

[185] Dzehtsiarou, *supra* note 80, at 143.

[186] Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo. Wash. Int'l L. Rev. 107, 110 and 115 (2009).

[187] Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 Theoretical Inquiries in Law 437, 440 (2013).

[188] Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 Theoretical Inquiries in Law 411, 415 (2013); James L. Gibson, Gregory A. Caldeira, & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998).

[189] Ivanne Trippenbach, *CEDH: Marine Le Pen veut sortir de la «camisole» des droits de l'homme*, l'Opinion (Jan 18, 2019), *available at* https://www.lopinion.fr/edition/politique/cedh-marine-pen-veut-sortir-camisole-droits-l-homme-174826.

[190] GPA: Marine Le Pen souhaite que la France quitte la CEDH, Le Point (Oct 5, 2014), *available at* https://www.lepoint.fr/politique/gpa-marine-le-pen-souhaite-que-la-france-quitte-la-cedh-05-10-2014-1869602_20.php.

[191] *See Debat over EHRM dat nationale wetgeving doorkruist*, PVV, *available at* https://pvv.nl/index.php/component/content/article.html?id=6616:debat-over-ehrm-dat-nationale-wetgeving-doorkruist.

[192] Janneke Gerards, *The Netherlands: Political Dynamics, Institutional Robustness*, *in* Popelier et al., *supra* note 3, at 329 (addressing exit proposals in 2013); and Motie van het lid markuszower (May 11, 2017), *available at* https://zoek.officielebekendmakingen.nl/kst-34235–9.html (2017 exit proposal during the parliamentary debates about Protocol 16 to ECHR).

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Party—often considered populist[193]—backed a popular initiative, "Swiss law, not foreign judges," which sought to shield Swiss law from international, especially Strasbourg, influences by means of a constitutional amendment. Its adoption could have accelerated Switzerland's withdrawal from the ECHR, but was rejected in the end.[194]

Importantly, the populist criticism of the ECtHR often uses very expressive, moralistic terms portraying the Strasbourg Court as a threat. Thierry Baudet—today the leader of Dutch populist party Forum for Democracy—depicted the ECtHR as a "ravening monster that, without the slightest legitimacy, overrules scores of national laws and regulations."[195] Jordan Bardella of the French National Rally referred to the Strasbourg Court as a "straitjacket" that France must release itself from.[196] Such demonic portrayals are often nourished by those tabloid media which are ideologically close to the populist parties and contribute to the delegimitazation of the ECtHR. British tabloid *The Sun*, for example, titled articles reporting about the Strasbourg Court "Victory for evil—European judges declare whole-life terms 'inhumane'" and "Court of Human Frights."[197] In articles about the ECtHR cases, Swiss media used expressions such as "human rights mafia" and "castration of democracy."[198] Sometimes, the populist criticism is even outright offensive. Reacting to the ECtHR's ruling concerning the display of totalitarian symbols, the Speaker of the Hungarian Parliament labeled the ECtHR judges as "some idiots in Strasbourg."[199] Matteo Salvini of the Italian populist party League stated: "I would close the Strasbourg court, it serves no purpose, we pay it to hand down one idiotic sentence after another."[200]

Oftentimes, populist actors criticize the ECtHR in reaction to particular judgments. Rulings touching upon security frequently trigger the critique as human rights law limits the "tough on crime" policies. The manifesto of the UK Independence Party, for instance, stipulated withdrawing from the Convention and repealing the Human Rights Act to ensure that "the interests of law-abiding citizens and victims will always take precedence over those of criminals."[201] Similarly, Hungarian Prime Minister Orbán criticized the ECtHR for declaring life imprisonment without parole a violation

[193] *See* Laurent Bernhard, *Three Faces of Populism in Current Switzerland*, 23 SPSR 509 (2017).

[194] Tilamnn Altwicker, *Switzerland: The Substitute Constitution in Times of Popular Dissent*, *in* Popelier et al., *supra* note 3, at 398–99; Constance Kaempfer, Sophie Thirion, & Evelyne Schmid, *Switzerland Rejects a Popular Initiative 'Against Foreign Judges'*, Opinio Juris (Dec 17, 2018), *available at* http://opiniojuris.org/2018/12/17/switzerland-rejects-a-popular-initiative-against-foreign-judges/.

[195] Baudet, *supra* note 8.

[196] Trippenbach, *supra* note 189.

[197] Graeme Wilson, *Victory for Evil*, The Sun (Jul 9, 2013), *available at* https://www.thesun.co.uk/archives/politics/857957/victory-for-evil/; Graeme Wilson, *Court of Human Frights*, The Sun (Jan 26, 2012), *available at* https://www.thesun.co.uk/archives/politics/329478/court-of-human-frights/.

[198] Altwicker, *supra* note 194, at 392–93.

[199] *See* Eszter Polgári, *Hungary: 'Gains and Losses'. Changing the Relationship with the European Court of Human Rights*, *in* Popelier et al., *supra* note 3, at 308.

[200] *Strasbourg Court "Useless" Says Salvini*, Ansa (Apr 9, 2015), *available at* http://www.ansa.it/english/news/politics/2015/04/09/strasbourg-court-useless-says-salvini_07b1abed-c340-443f-b073-776d80562b81.html.

[201] Roger Masterman, *The United Kingdom: From Strasbourg Surrogacy Towards a British Bill of Rights?*, *in* Popelier et al., *supra* note 3, at 464.

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of Article 3 ECHR.[202] He stated that the ruling was "outrageous" and further proof that in the European institutions "the rights of those who commit crimes prevail over the rights of innocents and victims."[203] In the Italian context, Salvini denounced the Strasbourg Court as "useless" in reaction to a ruling declaring that Italy condoned torture during a police action against anti-globalization protesters.[204] He reacted similarly after the ECtHR's judgment in *Provenzano*, which held in favor of a mafia boss in the context of extending a restrictive prison regime despite his serious health issues.[205] Salvini interpreted the ruling as "another demonstration of the uselessness of this European circus."[206]

Terrorism-related security concerns represent another area that frequently gives rise to strained criticism of the ECtHR by populist leaders. In France, politicians of the National Rally decried that "the ECHR, with the exorbitant influence on our jurisdictions, prohibits France from leading the anti-terrorist fight which it wishes."[207] This area has also been salient in Turkey. In *Demirtas*, the Strasbourg Court held that although the arrest of the applicant—a representative of a pro-Kurdish political party—was based on a reasonable suspicion of terrorism-related crimes, his extended detention was unjustified and was designed to limit Mr Demirtas's political participation. The ECtHR accordingly ordered Turkey to ensure that "the applicant's pre-trial detention is ended at the earliest possible date."[208] In response to this judgment, Turkish President Erdoğan said that the ECtHR's ruling amounted to support for terrorism: "Are you following this ECHR? Do you have a ruling on these? No country or institution that praises Gulenists has the right to speak of democracy. This isn't seeking justice, it's simply terror-loving."[209] Erdoğan rejected the judgment and stated—in clear contradiction to Article 46 (1) ECHR—that the Strasbourg Court's rulings are not binding.[210]

Yet another area inciting the populist delegitimization of the ECtHR is migration. Several examples from Hungary illustrate the tension. In 2017, Viktor Orbán delivered a speech asking for urgent reforms of the ECtHR because its judgments were a "threat to the security of EU people and invitation for migrants."[211] Reacting to a lawsuit at the ECtHR concerning the deportation of two asylum seekers, Hungary's

[202] *Magyar v. Hungary*, App. No. 73593/10, Eur. Ct. Hum. Rts, May 20, 2014.
[203] *See* Polgári, *supra* note 199, at 300.
[204] *Supra* note 200.
[205] *Provenzano v. Italy*, App. No. 55080/13, Eur. Ct. Hum. Rts, Oct 25, 2018.
[206] *Supra* note 7.
[207] Trippenbach, *supra* note 189.
[208] *Demirtas v. Turkey (no. 2)*, App. No. 14305/17, Eur. Ct. Hum. Rts, Nov 20, 2018, § 283.
[209] Turkey's Erdogan says ECHR ruling on jailed politician supports terrorism, Reuters (Nov 21, 2018), *available at* https://www.reuters.com/article/us-turkey-security-demirtas/turkeys-erdogan-says-echr-ruling-on-jailed-politician-supports-terrorism-idUSKCN1NQ1C2.
[210] Erdoğan rejects European court's "non-binding" decision over Demirtaş, Hürriyet Daily News (Nov 20, 2018), *available at* http://www.hurriyetdailynews.com/european-court-urges-turkey-to-free-demirtas-139022.
[211] *Supra* note 6.

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State Secretary labeled the litigation as a "Trojan horse" used by "international pro-migration forces" to dismantle laws protecting Europe.[212]

On the other hand, populists do not always denounce the Strasbourg Court. Sometimes they use it in their favor and even turn to the ECtHR themselves when necessary. In 2018, the Italian League, led by Salvini, announced its intention to turn to the ECtHR after the Italian Court of Cassation confirmed the seizure of party funds. The League's lawyers stated that the violation of law in this case was so obvious that it would be necessary to go to Strasbourg.[213] Another example concerns Andrej Babiš—the Czech populist Prime Minister who leads a lawsuit in Slovakia because he is listed in the historical archives as a collaborator of the communist secret police. After the Slovak Constitutional Court had ruled against Babiš, he filed a complaint with the ECtHR seeking justice in Strasbourg, unsuccessfully in the end.[214]

By and large, the combination of populist ideology and political style provides a particularly strong basis for challenging the ECtHR. An overview of the actual populist challenges to the ECtHR reveals the following points. First, it is important that such challenges are not limited to populist *governments*.[215] The combination of technological advancements (especially the social media), their skillful utilization by populists, and the "cognitive mobilization" of the people[216] increased the capability of populist leaders and parties to communicate with the public directly and, therefore, to affect the public sphere and to delegitimize rule of law institutions such as the ECtHR even if they are not in the government. As a result, the challenge of populist delegitimization of the ECtHR is not limited to Eastern Europe where a number of governments include populists, but it also applies to other parts of Europe where populist actors have not formed the government but have still gained prominence.[217] Thus, it can generally be said that the populist era broadens the possibilities of a backlash against ICs—attention should be paid not only to governmental actors but also to a broader array of populist actors across countries.

Next, the instances of the populist delegitimization critique support the previous conclusions about the pragmatic, even opportunistic nature of populist politics.[218] The populist criticism usually comes as a reaction to rulings touching upon specific policy

[212] *State Secretary Says ECtHR Lawsuit Is the New Method of Soros and His Network to Undo the European Legal Systém*, About Hungary (Apr 23, 2018), *available at* http://abouthungary.hu/news-in-brief/state-secretary-says-ecthr-lawsuit-is-the-new-method-of-soros-and-his-network-to-undo-the-european-legal-system/.

[213] *Fondi sequestrati, Lega ricorre a Corte diritti Ue*, adnkronos (Nov 10, 2018), *available at* https://www.adnkronos.com/fatti/politica/2018/11/10/fondi-sequestrati-lega-ricorre-corte-diritti_XdwnD5wtx7jQ4GNHy0cdqL.html.

[214] Ivana Svobodová, *Babiš zůstane v registru agentů STB. Štrasburk odmítl jeho stížnost*. Respekt (Dec 10, 2018), *available at* https://www.respekt.cz/politika/strasburk-odmitl-babisovu-stiznost-jeho-jmeno-v-registru-agentu-stb-zustane.

[215] Cf. Heike Krieger, *Populist Governments and International Law*, 30 Eur. J. Int'l L. (forthcoming).

[216] Ronald Inglehart, *Cognitive Mobilization and European Identity*, 3 Comp. Pol. 45 (1970).

[217] Moreover, even if populists are not in the government, they tend to push the mainstream parties towards hardline positions. *See* Eiermann et al., *supra* note 5.

[218] *See supra* note 83.

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areas. These are areas central for the local populist narrative of blame (e.g. migration in Hungary) and/or topics that can easily mobilize the political base using the arguments of the populist ideology (typically security). Sometimes the message is the denouncement of the ECtHR alone, sometimes it is coupled with suggestions for redress. These frequently include liberation from the Strasbourg Court's impact (exit), its ignorance (non-compliance), or structural restrictions (talk of "clipping wings" and "shutting down"). Importantly, the mobilization potential is increased by the rhetoric populists use. This often stresses the emotional element, employs expressive vocabulary vilifying the ECtHR, builds on public fears and anxieties, and channels those feelings against the Strasbourg Court and human rights in general. That is crucial since recent research shows that invoking fear and anger facilitates persuasion and agreement with the message,[219] which further increases the potential to mobilize and delegitimize.

The crucial question is: do such delegitimizing challenges really pose a threat to the ECtHR? First of all, some points of the populist critique are not unfounded, as argued in Section 2.2. The extent of the ECtHR's evolutive interpretation, stretching the scope of ECHR rights, disregard of national specificities, and the quality of the Strasbourg Court's rulings are all legitimate topics that should be raised in debates about the future of the ECHR regime. Their ignorance might actually be detrimental to the Strasbourg Court. However, populist actors do not seem to put forward serious ideas for reforming the system and re-balancing its democratic and liberal elements. The populist comments rather seem to be driven by the "linguistic depreciation strategy"[220] aiming to mobilize emotions and denounce the ECtHR.

Still, can a critical tweet or speech endanger one of the most effective ICs in the world? The challenge is not the single tweets and rhetorical figures, but rather the gradual change of the discursive frame they may induce, especially in an era of significant demographic and socioeconomic changes in Europe. As Crawford put it, "the increasing rhetoric of skepticism towards international law … may precipitate a large-scale retreat into nativism and unilateralism."[221] The combination of the ideological underpinnings and political style allows populists to effectively utilize the aforementioned social, economic, and identity anxieties of the people, potentially even across borders. The populist narrative of blame gives meaning to this anxiety and channels it into resentment towards the ECtHR and human rights more generally.[222] As stated above, invoking fear and anger plays a big role in the populist delegitimization of the Strasbourg Court, which further invigorates the resonance of the critique.

[219] *See* Shana Kushner Gadarian & Bethany Albertson, *Anxiety, Immigration, and the Search for Information*, 35 Pol. Psychol. 133 (2014); Ted Brader, *Striking a Responsive Chord: How Political Ads Motivate and Persuade Voters by Appealing to Emotions*, 49 Am. J. Pol. Sci. 388 (2005).

[220] Altwicker, *supra* note 194, at 392.

[221] James Crawford, *The Current Political Discourse Concerning International Law*, 81 Mod. L. Rev. 1, 22 (2018).

[222] *See* Bart Bonikowski, *Ethno-nationalist Populism and the Mobilization of Collective Resentment*, 68 Brit. J. Soc. S181 (2017); Tomasz Koncewicz, *The Role of Citizen Emotions in Constitutional Backsliding*, Reconnect (Mar 29, 2019), *available at* https://reconnect-europe.eu/blog/koncewicz-citizen-emotions-constitutional-backsliding/.

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Such a shift in the discursive frame surrounding the ECtHR has dangerous long-term implications since it can distort the social and political sources of the Strasbourg Court's independence and authority. The populist delegitimization can severely decrease the ECtHR's social legitimacy, which can, in turn, commence the gradual erosion scenario and lend support to non-compliance, violating the political norms of non-interference with the ECtHR's independence, and to further court-curbing.

In a way, the road to the Copenhagen Declaration—the most recent high-level CoE document addressing the ECtHR's future—can be interpreted as a step in this direction. In November 2017, Denmark took over the CoE's chairmanship. In the context of populism-infused domestic debates about the expulsion of foreign criminals, the Danish chairmanship announced its goal to reform the ECHR system and limit the ECtHR's dynamic interpretation practices.[223] The subsequent draft declaration was depicted by some commentators as an instrument institutionalizing political pressure on the ECtHR and an "attempt to handcuff the Strasbourg judges."[224] The final Declaration turned out to be a much more balanced document addressing the Strasbourg Court's core problems.[225] Still, although it has not prevailed this time, the draft declaration shows that the changing discourse on the ECtHR can affect even the highest levels of CoE politics.

The rhetorical delegitimization strategies can be reinforced by the domestic politics of non-compliance in the populist-governed countries. ICs still depend on domestic compliance and constituencies' cooperation in terms of giving effect to their rulings.[226] However, the strategy of authoritarian populists to "occupy"[227] the state institutions and restrict civil society considerably problematizes this. To name a few examples, populist governments in Hungary and Poland packed the constitutional courts, which have acted as the ECtHR's main compliance partners until recently, and managed to shift their ideological positions.[228] This has implications for ECHR compliance too. Regarding Hungary, Polgári reports that the treatment of the ECtHR's case law has become a cleavage in disputes between the judges nominated by the pre-Orbán Parliament and the new appointees. One of the new judges even objected to the binding nature of the Strasbourg case law and dissented to every decision where the

[223] Jacques Hartmann, *A Danish Crusade for the Reform of the European Court of Human Rights*, Eur. J. Int'l L.: Talk! (Nov 14, 2017), *available at* https://www.ejiltalk.org/a-danish-crusade-for-the-reform-of-the-european-court-of-human-rights/.

[224] Alice Donald & Philip Leach, *A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten*, Eur. J. Int'l L.: Talk! (Feb 21, 2018), *available at* https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/. For a different view of the draft Declaration, *see* Mikael Rask Madsen & Jonas Christoffersen, *The European Court of Human Rights' View of the Draft Copenhagen Declaration*, Eur. J. Int'l L.: Talk! (Feb 23, 2018), *available at* https://www.ejiltalk.org/the-european-court-of-human-rights-view-of-the-draft-copenhagen-declaration/.

[225] Ulfstein & Føllesdal, *supra* note 132.

[226] Alter, *supra* note 63, at 20–21 (distinguishing between compliance partners who possess formal powers to generate compliance, and compliance supporters who can put pressure on compliance partners).

[227] *See* Müller, *supra* note 19, at 44.

[228] Jan Petrov, *Unpacking the Partnership: Typology of Constitutional Courts' Roles in Implementation of the European Court of Human Rights' Case Law*, 14 Eur. Const. Law Rev. 499, 526 (2018).

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majority took the ECtHR's jurisprudence into account.[229] The Russian Constitutional Court was even granted an explicit competence to review the compatibility of the ECtHR's rulings with the constitution.[230] Also human rights NGOs—crucial compliance supporters of the ECtHR—have come under pressure from populist actors and their operational power has been severely limited.[231] Thus, the populist domestic reforms restricting the ECtHR's compliance partners and supporters might lead to the emergence of additional compliance difficulties and a drop in the Strasbourg Court's social legitimacy.

3.4. Summary: Populism as a distinctive challenge to the ECtHR?

This article argues that the current "explosion" of populism amounts to more than yet another instance of the sovereigntist critique of the ECtHR.[232] The recent populist surge has been rewriting the political map of Europe,[233] which elevates populist resistance to the Strasbourg Court to another level. As this article has shown, the challenge does not rest in inventing new court-curbing techniques. Rather, populism is distinctive by its great capacity to distort the ECtHR's legitimacy and authority. The critique is not limited to academic debates or tabloid criticism anymore, but affects the highest levels of politics and public debates in a number of European countries.

Thus, what makes the populist challenge specific and particularly threatening for the Strasbourg Court's independence and authority is the combination of (1) the ideological basis of populism, which results in a coherent constitutional vision and an overarching narrative of blame explaining the current problems of the people; and (2) populists' widely appealing style of political communication and its resonance within the general public. Consequently, populism has a (3) particularly high capacity to mobilize people (possibly even across countries), channel their resentment against the Strasbourg Court, and shift the discursive frame surrounding human rights adjudication in Europe.

In other words, populism is a thin ideology, which has clear implications for how democracy should work and explains why challenging the ECtHR is justified or even necessary. The populist message is then communicated in a specific way, building on people's fears and anxieties. Populism addresses often-overlooked issues and provides simple explanations and solutions embodied in the narrative of blame. It has a high mobilization capacity stemming from the majoritarian and nationalistic elements of

[229] Polgári, *supra* note 199, at 317–18.

[230] Petrov, *supra* note 228, at 517–18; Marina Aksenova & Iryna Marchuk, *Reinventing or Rediscovering International Law? The Russian Constitutional Court's Uneasy Dialogue with the European Court of Human Rights*, 16 Int'l J. Const. J. 1322 (2018). I mention Russia for the sake of completeness since some authors consider Russia a populist regime. *See* Neil Robinson & Sarah Milne, *Populism and Political Development in Hybrid Regimes: Russia and the Development of Official Populism*, 38 Int'l Pol. Sci. Rev. 412 (2017).

[231] *See* numerous examples in Antoine Buyse, *Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights*, 22 Int'l J. Hum. Rts 966 (2018).

[232] *See* Hirschl (*supra* note 52, at 2) who also singles out the populist challenge and argues that it differs from earlier grievances against globalization and global constitutionalism.

[233] Eiermann et al., *supra* note 5.

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populism complemented by the emotional and moralistic tone. The combination of these features arms populists with a political toolkit capable of mobilizing the audience and channeling people's fears against the ECtHR. The apparent resonance of the narrative of blame in many societal segments therefore makes the gradual erosion scenario particularly risky, especially since the Strasbourg Court has shown itself to be quite vulnerable to legitimacy challenges. As an IC, the Strasbourg Court is incomparably less well-equipped than populist politicians to communicate with and seek support from the general public, despite the ECtHR's recent educative efforts. Populist actors have better resources and virtually non-stop media access. The Strasbourg Court, on the other hand, has limited resources in terms of time (caseload), finances (budgetary issues), and communication skills, and a different primary mission than seeking popular support. The problem is even more intense since the ECHR system suffers from the heightened populist critique of the European Union. The lack of general understanding of the relationship between the EU and the CoE and the lack of awareness that the Strasbourg Court is not a part of the EU contributes to the spillover effect of criticism paid to the EU.[234] Moreover, with regard to populist governments' tendency to change the institutional environment and limit checks on their power, the ECtHR's delegitimization can be only a first step, which commences the gradual erosion scenario. Decreasing social legitimacy implies lower costs for non-compliance with the Strasbourg Court's decisions, and widespread non-compliance opens the door for further court-curbing and sidelining of the ECtHR.

To make it clear, this article does not argue that ICs should be free from criticism. Debates about the ECtHR's case law and functioning are crucial feedback mechanisms for the Strasbourg Court.[235] As argued above, criticizing the ECtHR's eventual activism, extensive dynamic interpretation, and effects of international judicialization on democratic and identitarian deficits are legitimate points in these debates. However, as Section 3.3. showed, the populist challenges are of a different kind. Rather than discussing the right balance within the ECHR system, the populist critique focuses on an antagonistic portrayal of the Strasbourg Court ("straitjacket", "monster") not acknowledging its rationale and even amounting to conspiracy theories ("human rights mafia", "Trojan horse"), and using the critique of the ECtHR for political mobilization and stressing the us versus them othering (see the remarks on the rights of migrants and criminals).

4. Conclusion

The ECtHR has been criticized from several positions for some time now. This article has argued that the recent explosion of populism in Europe poses an even greater challenge to the Strasbourg Court. The rise of populism does not only imply intensified

[234] Johan Karlsson Schaffer, Andreas Føllesdal, & Geir Ulfstein, *International Human Rights and the Challenge of Legitimacy*, *in* The Legitimacy of International Human Rights Regimes 1, 11 (Andreas Føllesdal, Johan Karlsson Schaffer, & Geir Ulfstein eds., 2014).

[235] Madsen, *supra* note 155.

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critique of the ECtHR. The combination of populist ideology and political style has been incrementally leading to a shift in the discursive frame surrounding the ECtHR and to questioning of some of the basic rationale of the ECHR system. Given the populists' tendency to change the institutional landscape and remove limitations on their power, the populist challenge to the ECtHR seems significant and pressing.

Nevertheless, the subsequent stocktaking of the ECtHR's institutional design showed that the Strasbourg Court is rather well protected from the most common court-curbing strategies targeting structural features of a court and judicial personnel. With the exception of severe problems regarding the ECtHR's budget and selection of judges, the high number and diversity of the ECHR's State Parties (decentralization), rather high level of judicial self-governance, and institutional safeguards of judicial independence insulate the ECtHR relatively well from attempts to prevent the court from effectively reviewing domestic policies or to "tame" the court.

However, there is another strategy of contesting the ECtHR—sidelining the Strasbourg Court through delegitimization and a gradual erosion of its authority and social legitimacy, which is particularly troubling for the ECtHR in the context of populism. Populists' greatest strength—a widely appealing narrative criticizing countermajoritarian institutions and providing justification for attacking courts—meets the Strasbourg Court's greatest weakness—vulnerability to legitimacy challenges. The populist challenge is particularly threatening for the Strasbourg Court's independence and authority, due to a combination of the ideological basis of populism (which results in a coherent constitutional vision and an overarching narrative of blame explaining the current problems of the people and providing their solutions) and an appealing style of political communication and its resonance within the general public. As a result, populism has a high capacity to mobilize people (possibly even across countries), channel their resentment against the Strasbourg Court, and shift the discursive frame surrounding human rights adjudication in Europe. That can lead to a decrease in the ECtHR's social legitimacy, which can, in turn, lend support to violating the political norms of non-interference with the Strasbourg Court's independence and to further court-curbing. In short, the populist delegitimization strategies can lead to the ECtHR's gradual erosion by interfering with the social and political sources of its independence and authority.

This article has focused on a diagnosis of the populist challenge to the ECtHR. Rather than finding ways to save the ECHR project, it made the prerequisite step and suggested what we should concentrate on in the age of populism when debating the future of the ECHR regime. The crucial question for future research is how the Strasbourg Court, CoE, and other actors should deal with the threat of the gradual erosion scenario. One possible development is that the pro-ECHR actors will use the populist critique constructively—as a "mirror"[236]—and navigate the reform process of the ECtHR in a direction that addresses some overlooked problems and takes seriously the concerns that lead many people to support populist actors. Another, much

[236] Landau, *supra* note 84, at 543.

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more worrisome version is that the populist leaders will succeed in the gradual erosion scenario and achieve a diminishing of the ECtHR's authority and independence. The latter scenario could hardly be interpreted as a victory for the people and democracy. It would eliminate one of the last checks on authoritarian populist governments and further unleash the "executive aggrandizement" typical of countries governed by authoritarian populists,[237] which is miles away from a democratic system responsive and accountable to the people.

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[237] Tarunabh Khaitan, *Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism*, 17 Int'l J. Const. L. 342 (2019).